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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Ron Barrow, Clerk
In the Court of Appeal of the State of California
First Appellate District
Division Two

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent

v.

JEFFREY WELTON NUNES
Defendant and Appellant
No. A063524

IN RE JEFFREY WELTON NUNES
On Habeas Corpus
No. A068851

Solano County Superior Court No. 26360

Jeffrey Welton Nunes was convicted, following a jury trial, of second degree murder. On appeal he contends (1) substantial evidence does not support his conviction for second degree murder, (2) trial counsel was ineffective in failing to object to prosecutorial misconduct in closing argument, (3) the court erred in giving conflicting jury instructions regarding the effect of voluntary intoxication on the charges against him, (4) the court erred in failing to instruct the jury that legally adequate provocation may occur over a considerable period of time, and (5) the court erred in calculating his presentence custody credits and he is entitled to four additional days of credits. He also has filed a petition for writ of habeas corpus alleging (1) trial counsel was ineffective in failing to communicate the correct terms of a plea bargain offer made by the district attorney, (2) trial counsel was ineffective in failing to object to prosecutorial

misconduct in closing argument, and (3) trial counsel was ineffective in failing to request the court to instruct the jury that legally adequate provocation could occur over a considerable period of time.

FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 1989, appellant was charged in Solano County with one count of murder (Pen. Code, § 187, subd. (a)),[1] and three counts of assault with a firearm (§ 245, subd. (a)(2)). It was alleged as to each count that appellant personally used a firearm within the meaning of sections 12022.5 and 1203.06.

Appellant's first jury trial in 1989 resulted in a mistrial due to a hung jury on the murder charge. The jury did find him guilty of one count of assault with a firearm, with personal use of a firearm, and with two counts of the lesser misdemeanor offense of exhibiting a firearm (§ 417). He was retried on the murder count in 1990. This trial also ended in a mistrial due to a hung jury, although the jury did issue a partial verdict that appellant was not guilty of first degree murder.

In 1991, appellant was convicted following a third jury trial of second degree murder and the firearm use enhancement was found true. On appeal, a differently constituted panel of this Division reversed the conviction after finding that the trial court committed reversible error by speaking to the jury during deliberations outside the presence of appellant and his counsel. (*People v. Nunes* (*Nunes I*) (A055947) January 21, 1993, p. 19.) The judgment on the other counts was affirmed. (*Ibid.*)

Appellant's fourth trial on the murder charge began on August 3, 1993. The following evidence was presented at that trial.

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1. Unless otherwise indicated, all further statutory references are to the Penal Code.

Prosecution Case

Emily Prien (formerly Nunes) and appellant married in 1984 and had two children during their marriage. In 1986, Prien initiated a five or six month separation, although the couple subsequently reconciled. Appellant was extremely distressed about the separation, and was hospitalized at least once at Napa State Hospital.

During their marriage, particularly after the 1986 separation, appellant drank heavily, usually consuming a six-pack or more of beer each day. He was jealous and possessive with Prien, and would not let her go places alone or with her girlfriends.

In early October 1988, Prien asked appellant to move out of their apartment in Suisun City because she needed time to herself. Appellant was extremely upset about the separation. She never told him she wanted a divorce until she served the papers on him when he was in jail following the commission of the acts in question. Without informing appellant, Prien took appellant's name off the lease and changed the lock on the front door. During the separation, appellant and Prien spoke on the phone and saw each other occasionally; appellant confronted her several times about going out, particularly to bars.

On November 12, 1988, Prien went to a holiday party at the Holiday Inn in Fairfield sponsored by her employer, Mervyn's Department Store. Prien arranged for the children to spend the night at her mother's house and went to the party at about 7:30 p.m. with her good friend, Kimberly Fure. After the party, Prien drove to Chauncy's bar with Fure and another coworker, Donald Gonsalves. Prien had known Gonsalves for about six months; they had never dated. At Chauncy's, they socialized with several other Mervyn's employees, as well as with a man named Tom Garant.

At about 1 a.m., appellant walked into Chauncy's. Prien knew he had been away on a hunting trip, and had thought he would be away all weekend. Appellant looked around for Prien, but did not see her and left. Prien was concerned that appellant

was going to let the air out of her car's tires, as he had done a couple of weeks earlier. While Prien remained in the bar, Fure, Gonsalves, and Garant went outside to check on her car. They found appellant releasing the air from Prien's tires and told him to stop. Appellant got in his car and drove away.

Prien and her friends then continued socializing at the bar until it closed at about 1 or 2 a.m. After stopping to fill the deflated tire on her car with air, Prien, Gonsalves, Fure, Garant, and two other friends went to Prien's apartment. Garant and Fure fell asleep on the living room couch and the two other friends soon left. At about 3 a.m., appellant called Prien, asking if she had been going to bars and calling her names. When Prien hung up on him, appellant left at least one angry message on her answering machine; Prien then took the phone off the hook.

Gonsalves, who did not have a car, asked Prien for a ride home. Prien suggested driving him home in the morning on her way to work, and he agreed. Prien told him he could sleep on the king-size waterbed in her bedroom. She went into the bathroom and changed into a bathrobe. When she came out of the bathroom, Gonsalves was already asleep on one side of the bed; she went to sleep in her robe on the other side.

At about 4:30 a.m., Garant was awakened by the sound of someone pounding on the front door, yelling, and breaking a window in the apartment. When Garant asked who was there, appellant answered: "This is Emily's husband. Open the fucking door." Garant opened the door; appellant had a gun in one hand and a beer in the other. According to Garant, appellant put the gun about three inches from Garant's head. Garant crouched and went toward Fure to wake her up, yelling: "Don't shoot. Don't shoot. I'm with her." As Fure woke up, appellant yelled to "get the fuck out." Appellant was waving the gun around as he spoke.

Prien, awakened by the sound of breaking glass, went into the living room and saw appellant with the gun shouting at Fure and Garant to get out. Gonsalves was still asleep. As Garant and

Fure ran out of the apartment, appellant and Prien yelled at each other and appellant fired a shot into the ceiling. Neither Garant nor Fure had trouble understanding appellant, whose speech was not slurred. He appeared to Garant to be in control of himself. Fure and Garant left in Garant's car and went to look for a phone to call the police.

Prien demanded that appellant leave. He asked if the reason she wanted him to leave was because someone was there, which Prien denied.[2/] Appellant then pushed her aside to go down the hall to the bedroom. As he did so, Prien's robe came open and appellant saw that she was nude underneath. Her normal habit was to wear a nightgown to sleep. Appellant went into the bedroom, turned on the light, and shot Gonsalves. Prien did not see what Gonsalves was doing when he was shot. Appellant then said: "Oh my God, I've just shot somebody. I think I'm in trouble." Appellant had been angry and upset until then, but became scared after the shooting. Prien told appellant to stay in the apartment while she called the police, but he pushed her aside and left. Prien then called 911.

During the entire time appellant was at the apartment, Prien did not see him put the gun to his head or threaten suicide. Neither Fure nor Garant heard appellant threaten suicide or saw him put the gun to his head.

Suisun City police officer Susan Lobao arrived at Prien's apartment at 5:02 a.m. Prien was hysterical and Gonsalves lay with his head in a pool of blood on the floor by the doorway of the bedroom. He was wearing a tank top and underwear. Prien told Lobao that her husband had shot Gonsalves. Appellant was arrested that morning at the home of his mother. Police also seized a revolver from appellant's mother's house. He showed no outward signs of being under the influence of alcohol or drugs. Appellant's blood was drawn at about 6:23 a.m.; an analysis of the blood sample showed a blood alcohol level of .14 percent. A subsequent breathalyzer test showed appellant

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2. In her prior testimony, in August 1991, Prien did not testify about this dialogue between herself and appellant.

had a .11 percent blood alcohol level.

William Robertson, a criminalist, testified that a long-time heavy drinker with a .14 percent blood alcohol level[3] may lose his moral inhibitions and disregard the consequences of his acts up to a point, but that he would still know what he was doing. He would certainly be able to recognize what firing a bullet into a human being could do, and would appreciate the need to flee once he killed someone.

Dr. Arnold Josselson, a pathologist, testified that he performed an autopsy on Gonsalves and found gunshot wounds to the face, the right shoulder, and the left thigh. The weapon had been held at least two to three feet from Gonsalves. The bullet wound to the thigh had traveled up into the abdomen and caused Gonsalves to bleed to death. Because of the upward path of the bullet, Dr. Josselson concluded that the thigh wound was inflicted while Gonsalves was either seated or lying down. Gonsalves would have been able to stand up after being shot in the thigh.

Defense Case

Appellant testified on his own behalf. He stated that during the 1986 separation, he was very confused and sad, and became a heavy drinker. He called the Fairfield Crisis Center at his mother's suggestion; when he told the counselor there that he thought of killing himself, he was involuntarily committed to Napa State Hospital for three days. Later, he was again involuntarily committed for two days after trying to overdose on pills. In January 1987, after appellant and Prien reconciled, Prien told appellant she was pregnant by another man and was going to have an abortion. After he went to Missouri for military basic training, Prien sent him a letter saying she was not pregnant after all. Soon thereafter, she again wrote to inform him that she was pregnant with his child. Appellant was confused and never fully reconciled to her contradictory

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3. Robertson acknowledged that appellant's blood alcohol level could have been as high as .17 percent when he shot Gonsalves.

statements about who fathered their second child.

In early October 1988, Prien told appellant she was not happy and asked him to give her some space, and he went to stay at a friend's house. Prien did not say she wanted a divorce, but appellant suspected that was her plan. During their separation, appellant learned that Prien was frequently going out at night. Appellant, who admitted he was a jealous and possessive person, was upset that Prien had lied to him about wanting time alone with the children.

On November 12, 1988, appellant went on a hunting trip, as he had told Prien he planned to do. He drank beer that day and when he returned from the trip that evening, he was feeling depressed about his marital problems. He went to a bar with a friend and continued to drink. At about midnight, on his way to the house where he was staying, appellant stopped at Chauncy's bar to see if his cousin Dave was there. He was upset when he saw Prien's car in the parking lot because she had said she was not doing anything that weekend. He went inside Chauncy's but did not see Prien there; he did see her friend, Kim Fure. He went outside and began to release the air from one of Prien's car tires. Fure came out accompanied by two men and confronted appellant. He asked Fure to have Prien come outside and talk to him, but Fure refused.

Appellant then returned to his friend's house where he was joined by his cousin Dave. They drank beer and shot pool. After Dave fell asleep, appellant continued to feel upset with Prien; he called her and cursed at her over the phone, calling her a slut and a whore. After she hung up on him, he left similar messages on her answering machine. He then called his mother, who suggested he call the Crisis Center and seek counseling. Appellant did not do so because he feared being sent back to Napa State Hospital for treatment. Finally, appellant took his revolver and drove to Prien's apartment, where he intended to threaten to kill himself in front of her to try to get some sympathy. He did not take the gun to shoot another person, nor did he know if anyone else was at the apartment.

When appellant discovered that his key no longer worked in the apartment's front door, he became angry and started banging on the door. When no one responded right away, he thought everyone was "still partying" inside, which made him even angrier. Appellant banged on the window until it broke. He was very angry to see Fure and Garant on the couch "half naked." Once inside, appellant waved his gun in the air and yelled at Fure and Garant to get "the hell out" of his house. As Fure and Garant left, Prien came out and began arguing with appellant. Appellant told her that her running around and lying to him were driving him to suicide. He pointed the revolver at his head, but she did not appear to care. She just kept screaming at him about the window. To show how distressed he was, appellant aimed his gun at the ceiling and fired a shot. He then cocked the gun again and pointed it at his head.

Appellant and Prien continued to argue. Suddenly, she grew quiet as if she heard something. Appellant asked her if someone else was in the house, and she said no, and told him to get out. She then rushed toward him and bumped into him, causing her bathrobe to fly open. Appellant saw that she was nude underneath and this made him very suspicious because he knew that she always slept in a nightgown.

Appellant went down the hallway into the bedroom where he turned on the light and saw Gonsalves under the sheets. Feeling hurt and betrayed, appellant screamed and cried. The man "jumped up and started coming at" appellant. He shot Gonsalves in a "panic reaction"; he had no intention to shoot or kill him. He could not recall pulling the trigger, and could only remember seeing "a bunch of flashes," which he realized had to be from his gun. After the shooting, appellant felt scared and said: "Oh my God, I think I'm in trouble." He fled the apartment and drove to his mother's house, intending to commit suicide, but his mother stopped him from doing so. At his mother's request, he gave her the revolver and waited while she called the police.

On cross-examination, appellant testified that he had fired the revolver he used to shoot Gonsalves several hundred times

before and had fired thousands of rounds in his life. He owned four handguns and five rifles and had been trained both in the military and on his own how to fire weapons. He also claimed that when he killed Gonsalves, he was in fear for his life because Gonsalves was "charging" him, although he later acknowledged that it was possible that Gonsalves was lying in the bed when appellant shot him. He did not even know he was shooting because he was "looking through tears" and everything was blurred. He ran from the apartment because Gonsalves was still coming at him. Appellant was not sure whether or how badly Gonsalves had been hurt.

Appellant admitted that when he called his mother at 4:15 a.m., about 45 minutes before the shooting, he told her he suspected Prien was "screwing around on me again."

Dr. Luigi Piciucco, a clinical psychologist, also testified for the defense. After interviewing appellant, reviewing his family history, and conducting several psychological tests on him, Dr. Piciucco concluded that appellant suffered from major depression, was dependent on alcohol, and had a mixed personality disorder. Appellant had low self-esteem and was "more likely to become suicidal than to direct this aggression in an outward manner" when he was depressed.

Police officer Anthony Welch testified on cross-examination during the prosecution's case that the position of the empty shells and one live round in appellant's gun was consistent with someone cocking the weapon and placing it to his head, firing one round at the ceiling, cocking it again and placing it to his head, releasing it without discharging a round, and then firing three rounds at Gonsalves.

The jury found appellant guilty of second degree murder and found the firearm enhancement to be true. On September 20, 1993, the trial court sentenced appellant to 15 years to life for second degree murder and 2 years for the firearm use enhancement. The court also sentenced appellant to a concurrent term of three years on count two and suspended the sentence on counts three and four.

Appellant filed a timely appeal and a petition for writ of habeas corpus. On February 17, 1995, we ordered that the writ petition would be considered with the appeal.

DISCUSSION

I.

Sufficiency Of The Evidence To Support The Second Degree Murder Conviction

Appellant first contends that substantial evidence does not support his conviction for second degree murder. According to appellant, the evidence was uncontroverted that he shot Gonsalves as the consequence of a sudden quarrel or heat of passion based on adequate provocation and, therefore, his conviction should be reduced to voluntary manslaughter. (See § 192, subd. (a); *People v. Bridgehouse* (1956) 47 Cal.2d 406 [where evidence is insufficient to support second degree murder conviction, reduction to manslaughter required].)

"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence – i.e., evidence that is credible and of solid value – from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55.)

Heat of passion involves both objective and subjective elements. (*In re Thomas C.* (1986) 183 Cal.App.3d 786,798, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) Thus, a defendant must first show that he acted under the actual influence of a strong passion at the time of the homicide. This "passion" "'need not mean "rage" or "anger" but may be any "[v]iolent, intense, high-wrought or enthusiastic emotion" . . . .'"

(*Id.* at p. 798, quoting *People v. Berry* (1976) 18 Cal.3d 509, 515.)

However, regardless of the degree of genuinely felt "passion," a claim of heat of passion cannot succeed without the additional element of adequate provocation. As our Supreme Court has explained: "'"[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and . . . consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man . . . . For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion – not necessarily fear and never, of course, the passion for revenge – to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v. Wickersham, supra,* 32 Cal.3d at p. 326, citation omitted; see also CALJIC No. 8.42.) "[T]here are substantial policy reasons to restrict the application of the heat of passion defense to cases where the circumstances are sufficiently provocative to trigger violent reactions in a reasonable person. . . . [S]ociety has a strong interest in deterring violent and homicidal conduct by not allowing individuals to justify their acts by their own standard of conduct. As stated in *People v. Valentine* [(1946)] 28 Cal.2d 121, 139, '[t]hus, no man of extremely violent passion could so justify or excuse himself if the existing cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man.'" (*People v. Ogen* (1985) 168 Cal.App.3d 611, 622.)

Finally, it is for the trier of fact to determine whether or not the particular facts and circumstances of a case are sufficient to create a reasonable doubt as to whether a defendant committed the offense under a heat of passion. (*People v. Pacheco* (1981) 116 Cal.App.3d 617, 625; see also *People v. Berry, supra*, 18 Cal.3d at p. 515.)

In the present case, we do not agree with appellant that the

evidence was uncontroverted that he shot Gonsalves as the consequence of "a sudden quarrel or heat of passion." First, the evidence showed that appellant's unreasonably jealous conduct had escalated during their separation. On the early morning in question, he saw Prien's car at a bar and let the air out of the tires. He later telephoned her and called her a "slut" and a "whore." Less than an hour before going to her apartment that morning, he called his mother and told her he suspected Prien was "screwing around" with another man. He then went to Prien's apartment with a loaded gun and proceeded to threaten the occupants of the apartment with the gun and, after Fure and Garant fled, asked Prien if someone else was there before pushing past her and going to the bedroom where he shot Gonsalves three times. Thus, there was evidence that he suspected Prien was with another man the morning of the shooting and that he went to her apartment with a gun to confront them and perhaps exact revenge. (See *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 ["It is important . . . to distinguish between jealousy as a motive for the killing and jealousy sufficient to invoke the 'heat of passion' concept."].)

In addition, while appellant testified that Gonsalves was "coming at" him when he shot him and was still coming at him when he fled the room, medical evidence showed that Gonsalves was sitting or lying down for at least one of the shots. Appellant also testified that he went to Prien's apartment to threaten suicide. The jury was not unreasonable in rejecting this testimony, given that no witness saw appellant put the gun to his head or heard him mention suicide. Although there was evidence that appellant was distraught and under the influence of alcohol when he shot Gonsalves, the witnesses agreed that he did not seem out of control or unaware of his actions.

Furthermore, even had appellant met the subjective element of heat of passion, he clearly has not satisfied the objective element, which requires a showing of adequate provocation. Appellant, by his own admission, was extremely jealous and possessive of Prien. Even after their separation, he attempted to control her, trying to keep her from going out, and keeping tabs on her activities. He also was admittedly extremely depressed

and a heavy drinker. His behavior on the morning of the shooting shows that he was harassing Prien, from whom he had been separated for five or more weeks and whom he suspected wanted a divorce. There is no evidence that Prien was attempting to provoke or humiliate him; she was merely living her life.

We thus cannot say the jury was irrational in finding that appellant's indignation and fury over Prien's social life was not "such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances." (CALJIC No. 8.42; *People v. Wickersham, supra*, 32 Cal.3d at p. 3261; see also *In re Thomas C., supra*, 183 Cal.App.3d at p. 798 [defendant's clinical depression was "not the ordinary man's average disposition."].) Appellant cannot use his own standard of conduct to justify the shooting of Gonsalves. (*See People v. Ogen, supra*, 168 Cal.App.3d at p. 622.)

Appellant claims that the circumstances of this case are nearly indistinguishable from *People v. Bridgehouse, supra*, 47 Cal.2d 406, in which our Supreme Court found that the defendant's conviction for second degree murder was not supported by the evidence, and therefore reduced his conviction to voluntary manslaughter. In *Bridgehouse*, the evidence showed that the defendant's wife told him she was having an affair with a man named Bahr and that they discussed for over a year her relations with Bahr. The defendant filed for divorce, which his wife said she would fight with lies or any other methods. (*Id.* at pp. 407-408.) The defendant then gave his wife two or three months to decide whether she wanted him or Bahr. On the day of the killing, the defendant went to his mother-in-law's house at his wife's suggestion to pick up socks for his young child who he was taking to the zoo. Inside the house he saw Bahr, who it turned out was living there at the time, sitting on the davenport reading. The defendant, visibly white and shaking, took a gun out of his belt and killed Bahr. (*Id.* at pp. 409-410.)

The Supreme Court found, "as a matter of law, that under the circumstances here presented there was adequate provocation to

provoke in the reasonable man such a heat of passion as would render an ordinary man of average disposition likely to act rashly or without due deliberation and reflection [citation]." (*People v. Bridgehouse, supra*, 47 Cal.3d at p. 414.) The evidence set forth by the court as supporting a finding of adequate provocation included the facts "that defendant's wife was having an affair which had extended over a considerable period of time with the deceased; that she would neither approve of the defendant commencing an action for divorce nor would she forego seeing the victim of the crime; that the sight of the victim in his mother-in-law's home was a great shock to the defendant who had not expected to see him there or anywhere else." (*Id.* at p. 413.) The court further noted that there was "no evidence in the record that defendant ever made any threatening remarks to, or about Bahr, or even any remarks showing resentment toward Bahr because of his love affair with Marylou Bridgehouse. All the evidence in the record shows that the defendant's reputation for peace and quiet . . . was 'very good' . . . ." (*Id.* at p. 412.) Finally the court observed that there was "ample, uncontradicted evidence that defendant was a man of excellent character; that he was mentally and emotionally exhausted and was white and shaking." (*Id.* at p. 414.)

The evidence discussed by the Supreme Court in *Bridgehouse* to demonstrate that the defendant acted under a passion that would be aroused in the mind of the ordinary, reasonable person, while having some similarities to the present case, is readily distinguishable in several important respects. Here, the evidence shows appellant had been behaving in an unreasonable and controlling manner toward his wife, from whom he was separated. On the morning in question, he harassed her; he let the air out of her car tires; he made obscene phone calls; and he came to her apartment, broke the window, brandished his gun, at the people in the apartment, and, finally, finding that his suspicions were apparently correct, killed the man he found lying in her bed. These facts are quite distinct from the evidence in *Bridgehouse*, which unequivocally showed that the defendant in that case was a reasonable person whose passion was understandably aroused by the unexpected encounter with his wife's long-time lover in his mother-in-law's home. (*People*

v. Bridgehouse, supra, 47 Cal.3d at pp. 411-414; see also *People v. Pacheco, supra*, 116 Cal.App.3d 617, 627.)[4]

Appellant argues that it is irrelevant whether he was "a man of excellent character" or even an "ordinarily reasonable person" for all purposes. According to appellant, the question is whether, *at the moment he inflicted the fatal wounds,* he was acting under the influence of heat of passion in response to provocation which "would cause the ordinarily reasonable person . . . to act rashly and without deliberation and reflection, and from such passion rather than from judgment." (CALJIC No. 8.42.) We cannot, however, divorce the moment when appellant shot Gonsalves from the events surrounding it, just as the Supreme Court in *Bridgehouse* examined the defendant's prior history and the surrounding circumstances in determining whether adequate provocation existed. Here, there was evidence that the killing of Gonsalves was the culmination of a course of conduct by an unreasonably jealous and controlling estranged husband. Thus, looking at the entire circumstances, the killing of Gonsalves was not, as a matter of law, caused by the type of passion that would cause the ordinarily reasonable person to act rashly.

Accordingly, substantial evidence supports appellant's

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4. This case is also distinct from *People v. Elmore* (1914) 167 Cal. 205, also relied on by appellant to show that he shot Gonsalves as the result of "a sudden quarrel or heat of passion" within moments of findings Gonsalves in his wife's bedroom. In *Elmore*, the Supreme Court reversed the defendant's conviction for second degree murder based on the fact that "the fatal wound was inflicted without legal malice and solely as the result of the sudden heat of passion excited in *Elmore* by the unprovoked attack and violent blows of [the victim]." (*Id.* at p. 211.) The court further explained: "All the circumstances tend to show that [the defendant] was acting in good faith and really desired to avoid any quarrel or difficulty." (*Ibid.*) The facts of this case clearly are not analogous to those described as the basis for the court's decision in *Elmore*. Here, the evidence showed that appellant was not acting in good faith when he came to Prien's apartment brandishing a gun. Moreover, the evidence showed, contrary to appellant's testimony, that Gonsalves was lying on the bed when he was first shot, not "coming at" appellant.

conviction of second degree murder.

II

Alleged Prosecutorial Misconduct During Closing Argument

Appellant next contends his trial counsel was ineffective in failing to object to prosecutorial misconduct during closing argument which distorted the definition of voluntary manslaughter. Because appellant failed to object to the prosecutor's argument at the time, he now may only attack the alleged misconduct indirectly by alleging, both on appeal and in his accompanying petition for writ of habeas corpus, that trial counsel was ineffective in failing to object to that misconduct. (See *People v. Green, supra*, 27 Cal.3d at p. 27.)

Appellant argues that the prosecutor's repeated references to whether an ordinarily reasonable person's passion would be aroused to such a degree "that they would kill as the defendant did," and to whether appellant was an ordinarily reasonable person completely distorted the legal requirements for a finding of voluntary manslaughter.[5/]

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5. The prosecutor's line of argument, of which appellant now complains, was as follows: "And the issue is not whether the defendant was aroused. It is whether an ordinarily reasonable person's passion would be aroused to such a degree that they would kill as the defendant did. [¶] And again, when we narrow it all down, here's the real issue: Would an ordinarily reasonable person of average disposition kill Donald Gonsalves as the defendant did? [¶] If you feel the answer to that is a yes, then this is voluntary manslaughter. If you feel the answer is no, then it's murder in the second degree. [¶] I suggest the facts are totally contrary that this defendant could be considered an ordinarily reasonable person of average disposition. By his own testimony, he doesn't have an average disposition. He's jealous. He's possessive. [¶] And you heard about the things in the behavior he engaged in over the six-week period. When a person who has -- again, 'ordinarily' means usually. You're a reasonable person of average disposition, not the defendant's disposition. [¶] But would a normal, reasonable person's disposition do as the defendant did? [¶] Would he call

The question, according to appellant, is not whether his reason was, at the time of the killing, disturbed by some passion to such an extent as would render an ordinary person of average disposition liable to kill, but whether it would render such a person liable to act rashly or without due deliberation and reflection. (*People v. Coad* (1986) 181 Cal.App.3d 1094, 1106; see also CALJIC No. 8.42.)

Regardless of whether the prosecutor's argument did in fact distort the definition of voluntary manslaughter and amount to prosecutorial misconduct, to succeed on his claim of ineffective assistance of counsel, appellant must show both that counsel's performance was deficient and that he was thereby prejudiced. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1339, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Plager* (1987) 196 Cal.App.3d 1537, 1542-1543.)

On appeal as well as in his writ petition, appellant asserts that counsel could not have had any valid reason for not objecting to the prosecutor's improper argument. In its informal opposition

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his wife on the phone two or three times and use the word 'slut' and 'whore' and various other things? [¶] Would he call his mom and say, 'I believe my wife is sleeping with someone'? [¶] Would he go to the house at five o'clock in the morning with a loaded gun? [¶] Would he have gone to the bar, let air out of the tires? [¶] And would he have gone to that house? [¶] Again, go back -- the whole case depends upon who to believe. You go back to the initial situation. And I asked him, because he testified, remember, 'I glanced into the boys' bedroom to make sure they weren't there,' and we had a number of questions about that. [¶] But an ordinarily reasonable person -- let's assume for this argument the defendant was telling the truth, that he was going to kill himself, but he wants to do it in front of his wife. Now, why would he have to do it at five o'clock in the morning escapes me, but grant him that. [¶] Would you do that if you really honestly believed your children were in the house?[¶] Would any reasonable, ordinary person of average disposition? [¶] First off, an ordinarily reasonable person of average disposition is not going to want to kill himself. But assume that, for the purpose of argument, you wanted to do it thinking your kids might be in the house. [¶] Didn't happen that way. He's not an ordinarily reasonable person."

to appellant's writ petition, respondent refers to the declaration of Deputy Attorney General Violet M. Lee, in which she states that defense counsel explained to her in a telephone conversation that "he made the tactical decision not to object to the prosecutor's argument . . . because [counsel] believed that an objection would have done nothing more than prompt the trial court to caution the jury to follow the instructions on the law as given by the court . . . ."

The failure to make objections usually involves tactical decisions on counsel's partand seldom establishes counsel's incompetence. (See, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 292.) "'Matters involving trial tactics are matters "as to which we will not ordinarily exercise judicial hindsight." [Citation.] "In the heat of a trial, defendant's counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel . . . ." [Citations.] . . . "The choice of when to object or not is inherently a matter of trial tactics not ordinarily reviewable on appeal; failure to object does not necessarily indicate incompetence . . . ."'" (*People v. Frierson* (1979) 25 Cal.3d 142, 158, quoting *People v. Najera* (1972) 8 Cal.3d 504, 516-517; see also *People v. Thomas* (1974) 43 Cal.App.3d 862, 869.)

In the circumstances of this case, it appears to have been a perfectly reasonable tactical choice on defense counsel's part to refrain from objecting and drawing further attention to the portion of the prosecutor's argument in question.[6] (*People v.*

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6. We also must note that our finding that counsel's failure to object was not an unreasonable choice of trial tactics is buttressed by the fact that it is highly doubtful that the prosecutor's line of argument was in fact misconduct. For example, as respondent observes, the Court of Appeal in *People v. Ogen, supra*, 168 Cal.App.3d at pages 621, in discussing the heat of passion defense, mentioned the "requirement that a provocation must be sufficient to excite the passions of a reasonable person to kill . . . ." The court further explained that in enacting section 192, the Legislature allowed "a defendant to reduce a killing from murder to manslaughter only in those

Frierson, supra, 5 Cal.3d at p. 158.) This is especially true in light of the fact that the trial court instructed the jury that to the extent arguments by counsel conflicted with its instructions on the law, the jury must follow the instructions.

In sum, counsel's failure to object did not constitute ineffective assistance, and the failure to object to the alleged prosecutorial misconduct waived the issue for appeal.

III

Conflicting Instructions Regarding The Effect Of Voluntary Intoxication

Appellant contends the trial court erred in giving conflicting instructions, pursuant to CALJIC Nos. 4.20 and 4.21, which he asserts likely confused the jury on the relationship between voluntary intoxication and the specific mental states of malice aforethought and intent to kill.

Appellant's attorney apparently did not object to the giving of either of these instructions, and neither party directly addresses whether the failure to object waives the issue on appeal, although appellant, in his reply brief, does quote (without discussion) *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249, in which the Court of Appeal stated that "an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court." (See also § 1259.) Giving appellant the benefit of the doubt that the footnoted quotation adequately raised the question, we will address whether his substantial rights were affected by the court's alleged instructional error. Answering this question "necessarily requires an examination of the merits of the claim -- at least to

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situations where the provocation would trigger a homicidal reaction in a reasonable person." *(Id.* at p. 622.)

the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen, supra*, 26 Cal.App.4th at p. 1249.)

The court first instructed the jury with CALJIC No. 4.21, which relates voluntary intoxication to the mental state of malice aforethought, a necessary element of murder:

"In the crime of murder, of which the defendant is accused in Count One of the Information, a necessary element is the existence in the mind of the defendant of the mental state of malice aforethought. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether the defendant had such mental state. [¶] If, from all the evidence, you have a reasonable doubt whether the defendant formed such mental state, you must find that he did not have such mental state."

Immediately after giving CALJIC No. 4.21, the court gave CALJIC No. 4.20:

"The law provides that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of his having been in such condition. [¶] In the lesser-related crime of involuntary manslaughter, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve him of responsibility for the crime."

Later, during a break in defense counsel's closing argument, the court instructed the jury again with CALJIC No. 4.21, this time relating voluntary intoxication to the specific intent to kill:

"In the crimes of murder with express malice and voluntary manslaughter, a necessary element is the existence in the mind of the defendant of the specific intent to kill. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether the defendant had such specific intent. [¶] If, from all the evidence, you have a reasonable doubt that the defendant formed such specific intent, you must find that he did not have

such specific intent."

In this case, the jury was instructed on second degree murder and voluntary manslaughter, both specific intent crimes, as well as on involuntary manslaughter, a general intent crime. It was therefore appropriate for the trial court to instruct on the distinct rules regarding intoxication for each type of crime. (See § 22.) Appellant argues, however, that the court erred in giving CALJIC No. 4.20 immediately after giving CALJIC No. 4.21 without informing the jury that the latter explains an exception to former (see *People* v. *Rivera* (1984) 162 Cal.App.3d 141, 145), and that, in this case, CALJIC No. 4.20 applied only to involuntary manslaughter.

Appellant is correct that the court should have thus explained the two instructions. In fact, although not mentioned by either party, in 1992 -- well before appellant's trial -- a new instruction was added, CALJIC No. 4.21.1, which is intended to be used in cases like this one, where a defendant is charged both with specific and general intent crimes. (See *People* v. *Aguirre* (1995) 31 Cal.App.4th 391, 397-398.) New CALJIC No. 4.21.1 contrasts specific intent crimes with general intent crimes by noting that voluntary intoxication can be considered with respect the former.[7] The Use Note for the present versions of

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7. Specifically, CALJIC No. 4.21.1 states: "Under the law, it is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of being in such condition. [¶] Thus, in the crime[s] of ____ charged in Count[s] ____, . . . the fact the defendant was voluntarily intoxicated is not a defense and does not relieve the defendant of responsibility for the crime. This rule applies in this case only to the crime[s] of _____ . . . . [¶] However, there is an exception to this general rule, namely, where a [specific intent] [or] [mental state] is an essential element of a crime. In such event, you should consider the defendant's voluntary intoxication in your determination of whether the defendant possessed the required [specific intent] [or] [mental state] at the time of the commission of the alleged crime. [¶] Thus, in the crime[s] of ____, ____, _____, charged in Count[s] _____ . . . a necessary element is the existence in the mind of the defendant of [a] certain [specific intent[s]] [or] [mental state[s]] which is included in the definition of the crime[s] set forth elsewhere in these instructions." (1992 New)

CALJIC Nos. 4.20 and 4.21 (1992 rev.) advise that "[i]f the trial includes crimes requiring both general and specific intent, or a particular mental state, use CALJIC 4.21.1."

We conclude that the trial court's failure to give new CALJIC No. 4.21.1 or to otherwise explain the apparent contradiction between CALJIC Nos. 4.20 and 4.21 was error. (See *People v. Aguirre, supra*, 31 Cal.App.4th at pp. 397-398; cf. *People v. Ford* (1964) 60 Cal.2d 772, 796; *People v. Cameron* (1994) 30 Cal.App.4th 591, 599-600; *People v. Rivera, supra*, 162 Cal.App.3d at p. 145.)[8]

However, we also find that the error was harmless in the circumstances of this case. First, to the extent the giving of CALJIC No. 4.20 immediately after CALJIC No. 4.21 confused the jury as to the applicability of voluntary intoxication to the case, such confusion was alleviated by the court's later repetition, during a break in closing arguments, of the part of CALJIC No. 4.21 dealing with the effect of voluntary intoxication on specific intent in relation to the crimes of murder and voluntary manslaughter.[9] Defense counsel in fact took advantage of the court's supplemental instruction by

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We also note that in 1992, CALJIC Nos. 4.20 and 4.21 were revised slightly; their content, however, remains essentially the same. The trial court used the pre-1992 versions of these instructions at trial.

8. Appellant cites *Ford*, *Cameron*, and *Rivera* to show that the trial court erred in giving CALJIC Nos. 4.20 and 4.21 without any explanation. Although the factual scenarios in those three cases differ from the present case in significant ways, they nevertheless underscore the potential confusion caused by giving the two instructions without clarifying their applicability to the charges faced by a defendant.

9. In the version of CALJIC No. 4.21 that the court gave earlier, it had only discussed voluntary intoxication as affecting the mental state of malice aforethought in the crime of murder and had inadvertently left out the part of the instruction concerning specific intent.

immediately thereafter, and again later, explaining to the jury in great detail the meaning and importance of the instruction:

"And one of those instructions is just what the Judge is talking about, the concept that, since Mr. Nunes was drink[ing] heavily in the morning and evening of the 12th and 13th, that, in fact, with the instruction, the law is that the alcohol could prevent him from being able to form the specific intent or the implied or express malice. [¶] If you find that alcohol, in and of itself, prevented him from forming that type of express malice, that alone, the alcohol alone, without passion, without anything else, will reduce the crime from -- essentially, from murder in the second degree to a manslaughter. [¶] But it would be an involuntary manslaughter versus the manslaughter, because you would have no specific intent, and specific intent is required in the crime of voluntary manslaughter. [¶] So -- so you're clear, alcohol alone could reduce this crime from second degree murder or voluntary manslaughter to involuntary manslaughter. [. . . .] [¶] And keep in mind -- and I don't want to go over the law again. Keep in mind the only way you can get to a second degree murder in this case is if you find this -- this crime was not committed in the heat of passion or on sudden quarrel or an honest and reasonable belief of the need to defend oneself, in addition to which you have to find that the alcohol had no affect [*sic*] on his mental state whatsoever, at least it didn't have any impact on his ability to form the specific intent or the express malice."

The court's supplemental reading of CALJIC No. 4.21 – given quite awhile after its initial reading of CALJIC Nos. 4.21 and 4.20 – which explained that voluntary intoxication can negate the specific intent required for conviction of murder or voluntary manslaughter, immediately followed by counsel's detailed discussion of the meaning of that instruction and its effect on the case, clearly counteracted any confusion that may have been caused by the initial reading of the two instructions. (See *People v. Odle* (1988) 45 Cal.3d 386, 421 ["[A]ny doubt we may have had about the jury's understanding of its duty and responsibility [caused by court's failure to instruct on a certain point] is dispelled by defense counsel's argument. He plainly

and correctly informed the jury of its duty and responsibility . . . ."].)

Thus, while it would have been preferable for the trial court to use CALJIC No. 4.21.1 or to explain the relationship between the two instructions, viewing the record as a whole, the court's error in failing to do so was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Ford, supra*, 60 Cal.2d at p. 798 [using *Watson* harmless error standard]; *People v. Rivera, supra*, 162 Cal.App.3d at p. 146 [same].)[10/] Consequently, appellant's substantial rights were not affected by the trial court's instructional error. (See *People v. Andersen, supra*, 26 Cal.App.4th at p. 1249.)

IV

Court's Failure To Instruct That Provocation Can Be Of Long Duration

A.

Appellant also contends the trial court erred in failing to instruct the jury, pursuant to CALJIC No. 8.42, that legally adequate provocation can occur over a considerable period of time.

The 1991 revision of CALJIC No. 8.42 contains optional language, based on *People* v. *Wharton* (1991) 53 Cal.3d 522, which appears in brackets as follows:

"To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden

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10. The two cases appellant cites in support of his claim that the Chapman standard of error (*Chapman v. California* (1967) 386 U.S. 18) is applicable in this situation are not helpful in that they both involved the trial court's failure to instruct or misinstruction on specific intent as it related to murder. (*People v. Visciotti* (1992) 2 Cal.4th 1, 58-59; *People v. Lee* (1987) 43 Cal.3d 666, 671, 673-676 [finding situation analogous to cases in which issue of specific intent was completely removed from jury's consideration].) This case clearly does not involve that level of egregious error.

quarrel or heat of passion, the provocation must be of such character and degree as naturally would excite and arouse such passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

"The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [*Legally adequate provocation may occur in a short, or over a considerable, period of time.*]

"The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

"If there was provocation, [*whether of short or long duration,*] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed such provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter."

Appellant argues that without the bracketed language, the instructions given could have led the jurors to believe that relevant provocatory events were limited to those occurring immediately before the shooting.

In *People v. Wharton, supra*, 53 Cal.3d at p. 569, the trial court refused to give a special instruction that would have told

the jury, among other things, that a defendant may act in the heat of passion at the time of the killing as a result of a series of events which occur over a considerable period. The California Supreme Court held that "the court erred in refusing to instruct the jury, at defendant's request, that legally adequate provocation could occur over a considerable period of time." (*Id.* at p. 571 .) However, the court found the error harmless since "the jury was otherwise given comprehensive instructions on provocation and heat of passion and nothing in those instructions *precluded* the jury from finding adequate provocation resulting from conduct occurring over a considerable period of time." (*Id.* at p. 572.) Moreover, there was evidence before the jury showing provocation occurred over a period of time and defense counsel urged the jury in his closing argument to find such provocation, noting the nature of the relationship between the defendant and the victim and the duration of the alleged provocation. (*Ibid.*)

In this case, unlike in *Wharton*, appellant did not ask the court to include the optional language when it gave CALJIC No. 8.42. The addition to CALJIC No. 8.42 argued for by appellant "was an instruction that related certain evidence to an element of the crime and attempted to raise a reasonable doubt as to that element. Such an instruction is a pinpoint instruction under [*People v. Saille* (1991) 54 Cal.3d 1103, 1120], and as such, need not be given sua sponte." *People v. Lee* (1994) 28 Cal.App.4th 1724, 1733-1734; *People v. Wharton, supra*, 53 Cal.3d at pp. 570-571 ["A criminal defendant is entitled, on request, to an instruction 'pinpointing' the theory of his defense."]; see also *People* v. *Hill* (1992) 3 Cal.4th 959, 997-998 [party may not complain on appeal that instruction correct in law and responsive to evidence was too general or incomplete unless he has requested appropriate clarifying or amplifying language].) Therefore, the court had no automatic duty to add the optional language when it gave CALJIC No. 8.42.

B

Appellant argues in the alternative, both on appeal and in his habeas petition, that his counsel was ineffective in failing to

request that the optional language be included when the court gave CALJIC No. 8.42. He observes that the *Wharton* decision as well as the revision to CALJIC No. 8.42 occurred over two years before appellant's trial, and asserts that defense counsel should have been aware of it. Appellant also states that our prior opinion in *Nunes I* should have alerted trial counsel of the need to explain that adequate provocation could arise over an extended time.[11/] He also argues that CALJIC No. 8.42 was a critical instruction in this case as well as that the optional *Wharton* language was completely consistent with the defense's theory and would have undercut the prosecutor's argument that this was not a classic case of voluntary manslaughter in which a husband believes he has a happy marriage until he unexpectedly finds his wife in bed with another man.

In its informal opposition to appellant's writ petition, respondent refers to the declaration of Deputy Attorney General Violet M. Lee, in which she states that defense counsel explained to her in a telephone conversation that he "did not request that CALJIC No. 8.42 be modified to include language informing the jury that legally adequate provocation could occur over a considerable period of time because [he] argued this point to the jury in his closing argument and the prosecutor did not raise this as an issue."

Even if counsel's representation was deficient, we will reverse the judgment only if appellant can show prejudice, i.e., that absent counsel's failings, a more favorable result would

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11. In *Nunes I*, a panel of this Division concluded that the trial court had erred in discussing the meaning of a portion of CALJIC No. 8.42 with the jury outside of the presence of appellant and his counsel. *(Nunes I* at p. 14.) The panel found that, since provocation was the central issue in the case, defense counsel should have been included in the discussion. *(Id.* at p. 15.) The panel noted that defense counsel could have asked the court, for example, "to instruct that bringing a gun to Emily's house does not automatically preclude a finding of voluntary manslaughter if the jury also found that defendant was acting under heat of passion resulting from long-continued provocative
conduct." (*Ibid.*)

have been probable. (*People v. Cummings, supra*, 4 Cal.4th at p. 1339, citing *Strickland v. Washington, supra*, 466 U.S. at p. 687.) We find no prejudice in this case since, assuming arguendo that counsel should have requested the optional *Wharton* language, there was, as in *Wharton*, "evidence before the jury showing provocation occurring over a period of time and no instruction precluding the jury from giving that evidence its due weight." (*Id.* at p. 572.) In addition, defense counsel emphasized in closing argument that the period of provocation was considerable, extending back to his first separation from Prien in 1986. Counsel urged the jury to consider appellant's alcoholism, his low self-esteem, his depression, and his prior suicide attempts in combination with the events on the night and morning of the murder. Counsel also discussed appellant's and Prien's relationship, including her alleged dishonesty and other ongoing provocatory conduct. Moreover, the prosecutor never disputed that the period of provocation can be considerable. (See *ibid.*)

Accordingly, since appellant has not shown prejudice, that is, that absent counsel's failings a more favorable result would have been probable, his ineffective assistance of counsel claim must fail. (See *People v. Cummings, supra*, 4 Cal.4th at p. 1339.)

V.

Calculation Of Presentence Credits

Appellant's final contention on appeal is that the trial court erred in calculating his presentence custody credits and that he is entitled to four additional days of credits. Respondent agrees.

The abstract of judgment states that appellant is entitled to a total of 2,655 days of credit for time spent in custody, based on 1,771 days of actual time and 884 days of conduct credit. The record shows appellant was taken into custody on November 13, 1988. He was sentenced on September 20, 1993. He should have received credit for all days in custody, including the day of arrest and sentencing. (*People* v. *Bravo* (1990) 219 Cal.App.3d

729, 735.) Thus, he is entitled to credit for 1,773 days in actual custody rather than the 1,771 days awarded by the trial court. Using 1,773 days of credit as the basis for calculation, appellant is entitled to 886 days of conduct credits rather than the 884 days awarded by the trial court. (See *ibid.*; § 4019.)

Appellant is therefore entitled to a total of 2,659 days of credit rather than the 2,655 days awarded by the trial court. (See *People* v. *Guillen* (1994) 25 Cal.App.4th 756, 764.)

VI

Counsel's Alleged Failure To Correctly Communicate The Correct Terms Of A Plea Bargain Offer

One issue remains from appellant's petition for a writ of habeas corpus: Whether his trial counsel was ineffective in failing to communicate the correct terms of the prosecutor's plea bargain offer. Apparently, assistant district attorney Harry Kinnicutt offered appellant an 11-year prison sentence with a waiver of all presentence credit in exchange for a guilty plea to voluntary manslaughter. Appellant claims that trial counsel wrongly informed him that he was being offered a plea bargain for a 22-year sentence, with a waiver of all presentence credits. Appellant refused this offer because he believed that if he accepted it, he would not be released until 2003, whereas if he was reconvicted of second degree murder (as he ultimately was), he would be eligible for parole in 2000.

Appellant claims that after hearing of the 22-year offer from trial counsel, but prior to trial, his mother told him that she had heard the actual offer made by the prosecutor was for 11 years. When appellant attempted to call counsel collect from the jail to ask him about what his mother had said, his calls were refixed by counsel's office.

Furthermore, according to appellant, counsel "never gave me any further opportunity to confer with him concerning the plea offer. He would generally appear in court just before trial proceedings were to begin."

In declarations submitted with their briefs in this matter, appellate counsel and respondent both state that they spoke with appellant's trial counsel on the telephone. Appellate counsel Richard L. Rubin declares that trial counsel told him the offer he communicated to appellant included an 11-year sentence for voluntary manslaughter and, he believed, a 3-year consecutive sentence for firearm use, with a waiver of all presentence credits.[12/] Deputy Attorney General Violet M. Lee declares that trial counsel informed her that he had fully communicated the prosecutor's offer of an 11-year sentence with a waiver of presentence credits.

In *In re Alvernaz* (1992) 2 Cal.4th 924, the California Supreme Court clarified the rule regarding claims of ineffective assistance of counsel in the plea bargaining process. "The *Alvernaz* court said to demonstrate that a defendant has received constitutionally inadequate representation by counsel, he or she must show: (1) that counsel's representation was deficient; and (2) that counsel's deficient performance subjected him or her to prejudice. To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*People v. Snyder* (1993) 14 Cal.App.4th 1166, 1176, citing *In re Alvernaz, supra*, 2 Cal.4th at pp. 936-937, footnote omitted.)

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12. Appellant further claims in his writ petition that trial counsel failed to respond to other inquiries following the initial conversation described in appellate counsel's declaration. He asserts that trial counsel's noncooperation suggests an inference of ineffectiveness and bad faith. Because we conclude that all of the contentions in appellant's habeas petition are, on their face, meritless, trial counsel's alleged evasiveness is not relevant to our inquiry.

We also take judicial notice of the materials pertaining to defense counsel filed by appellant with this court on September 11, 1996, although as will be seen, we find appellant was not prejudiced by any failure of counsel to communicate, and said materials are therefore of dubious relevance.

In this case, it is not necessary to make the factual determination as to whether trial counsel correctly communicated the terms of the plea agreement because regardless of any deficient performance on counsel's part, appellant has not shown prejudice. Specifically, he has not shown that "but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain . . . ." (*People v. Snyder, supra*, 14 Cal.App.4th at p. 1176.)

"In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement -- after trial, conviction, and sentence -- that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*In re Alvernaz, supra, 2* Cal.4th at p. 939.) Appellant acknowledges that he had information from his mother before trial began that the terms of the plea offer differed from what counsel allegedly told him. His assertions that he was unable to raise the issue with his attorney before trial are simply not credible. Even if he could not reach his attorney on the telephone, he appeared in court with counsel before and during the trial. And even if counsel had refused to discuss the matter, appellant has made no showing that he could not have raised the question with the trial court, asked for a clarification of the terms, and accepted the offer. In addition, appellant was facing his fourth trial in this matter. The first two ended in hung juries; the third resulted in a reversal. A person in appellant's situation would most likely believe that, at trial, he would have a very good chance of a voluntary manslaughter conviction. That he faced a mid-term of six years in prison, with credit for the

approximately five years he had already been in prison if he were convicted of voluntary manslaughter following trial, as compared to 11 years in prison, including a waiver of all presentence credits under the plea offer, further shows the likelihood a person in appellant's shoes might well choose to go to trial rather than accept the plea offer.

Thus, appellant's opportunity to request a clarification of the terms of the plea offer prior to sentencing, along with the likely benefits of proceeding to trial, convince us that appellant "has [not] established a reasonable probability that, with effective representation, he . . . would have accepted the proffered plea bargain." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.) Consequently, because he has not shown that he would have accepted the plea bargain, the prejudice requirement described in *Alvernaz* has not been met. (See *In re Alvernaz, supra*, 2 Cal.4th at pp. 936-937; *People v. Snyder, supra*, 14 Cal.App.4th at p. 1176.)

Even assuming his factual allegations to be true, appellant has not demonstrated that he received constitutionally inadequate representation in the plea bargaining process, and, accordingly, has not made a prima facie showing on this issue.

DISPOSITION

The abstract of judgment is modified to reflect a total of 2,659 days of presentence credit. As so modified, the judgment is affirmed. The petition for writ of habeas corpus is denied.

/s/
Kline, P. J.

We concur:

Haerle, J.

Lambden, J.

People v. Nunes - A063524
In re Nunes - A068851